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THE CURRENT STATE OF EVIDENTIARY PRIVILEGES IN LOUISIANA

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INTRODUCTION

The recently enacted Louisiana Code of Evidence represents a new approach to evidence law in Louisiana in at least one critical respect: it brings together all of the major rules of evidence within a single comprehensive and coherent system. The Code, however, is silent on the subject of evidentiary privileges. The Louisiana State Law Institute is currently working to fill this gap. In the interim, Louisiana lawyers must continue to use the existing evidentiary privileges, both those that are scattered throughout the Revised Statutes and those that have been created by the courts.

The purpose of this article is to review the current state of evidentiary privileges in Louisiana. Presently, Louisiana recognizes seven general privileges¹ as well as a number of narrow statutory privileges, most of which are cast in terms of specific requirements of confidentiality.² No

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1. The seven major privileges in Louisiana are: 1) Attorney-client, civil cases, La. R.S. 13:3734.3 (Supp. 1988), criminal cases, La. R.S. 15:475 (1981); 2) Husband-wife, criminal cases, La. R.S. 15:461 (1981); 3) Physician-patient, civil cases, La. R.S. 13:3734 (Supp. 1988), criminal cases, 15:476 (1981); 4) Priest-penitent, civil cases, La. R.S. 13:3734.1 (Supp. 1988), criminal cases, La. R.S. 15:477 (1981); 5) Informant, see *State v. Dotson*, 256 So. 2d 594 (La. 1971); 6) Journalist, La. R.S. 45:1451-55 (1982 & Supp. 1988); and, 7) Psychologist, La. R.S. 37:2363 (1988).

2. Accountant, La. R.S. 37:87 (1988); Adoption records, La. R.S. 9:437 (1965 & Supp. 1988); AIDS testing, La. R.S. 40:1299.40(D)(2); Anatomical gift, La. R.S. 17:2352(D) (1982); Attorney general's investigation; suits against state employees, 13:5108.1(E) (Supp. 1988); Commercial feed sellers, business practices, La. R.S. 3:1901(c)(5) (1987); Commodity dealers, La. R.S. 3:3421 (1987); Community shelter records, La. R.S. 46:2124.1; Counselor, La. R.S. 37:1114 (1988); Crawfish research report, La. R.S. 3:556.10 (1987); Crimestoppers organizations, La. R.S. 15:477.1 (Supp. 1988); Dairy industry information, La. R.S. 3:577.12 (1987); Drug tests and reports, students, La. R.S. 14:403.1 (1986); Employment records, La. R.S. 23:1660 (1985); Ethics board proceedings, La. R.S. 42:1141(12) (Supp. 1988); Fertilizer manufacture reports, La. R.S. 3:1367; Fertilizer sales, La. R.S. 3:1314(C)(2)(c); Financial Institutions Office, records, La. R.S. 6:103 (1986 & Supp. 1988);

attempt will be made here to catalogue all of these special provisions, or even all of the general privileges. Instead, this article deals only with the three most important general privileges: husband-wife, physician-patient, and attorney-client.³ Although some evidentiary rules, such as the rule of waiver, cut across all privileges, the approach used in this article will be to discuss each privilege separately. Furthermore, for purposes of clarity the evidentiary privileges for civil cases and criminal cases will be discussed separately.

THE SPOUSAL PRIVILEGE (HUSBAND-WIFE PRIVILEGE)

Civil Cases

Apparently Louisiana does not presently afford spouses a privilege in civil cases, even when the evidence at issue concerns their "private conversations." Prior to 1950, Louisiana did have a privilege that covered such private conversations.⁴ When the legislature enacted the Revised Statutes in that year, however, it neglected to include a spousal privilege for civil cases. It is not clear whether the omission was intentional.⁵ At any rate, the legislature thus far has made no effort to reinstitute a spousal privilege for civil cases.

Criminal Cases

Louisiana Revised Statutes 15:461 sets forth the rules governing the spousal privilege in criminal cases.⁶ This spousal privilege applies only

Foreign banks, La. R.S. 6:567 (1986); Foster parents, records of investigation, La. R.S. 46:284 (1982); Insurance agent termination, report to commissioner, La. R.S. 22:1120(B) (1978); Interpreters, La. R.S. 46:2371 (1982); Judicial commitment, report, La. R.S. 28:56(A) (Supp. 1988); Judiciary commission records, La. R.S. 44:10 (1982); Livestock crimestoppers, La. R.S. 3:750(F) (1987); Matrimonial rights or status, civil case, La. R.S. 13:3734.2 (Supp. 1988); Mediator, La. R.S. 9:354-55 (Supp. 1988); Medical peer review committee records, La. R.S. 13:3715.3 (1988); Pesticides formula, La. R.S. 3:3221 (1987); Presentence, pre-parole, clemency investigative report, La. R.S. 15:574.12 (Supp. 1988); Public employee personnel records, La. R.S. 44:11 (Supp. 1988); School employee assessment report, La. R.S. 17:391.5(E) (1982); Social worker, La. R.S. 37:2714 (1988); Tax records, La. R.S. 47:1508 (Supp. 1988); Trade secrets, La. R.S. 51:1435 (1987).

3. This is not to suggest that the other four general privileges may not be important in particular cases. However, because there is little jurisprudence relating to these four privileges, a discussion of these privileges probably would not be helpful.

4. 1916 La. Acts No. 157, § 1 provided in part: "[T]he competent witness in any proceeding, civil or criminal, in court, or before a person having authority to receive evidence, shall be a person of proper understanding, but: First. Private conversations between husband and wife shall be privileged. . . ."

5. See Note, Evidence—The Husband-Wife Testimony Privilege, 14 La. L. Rev. 427 (1954), reprinted in G. Pugh, Louisiana Evidence Law 173 (1974).

6. La. R.S. 15:461 (1981) provides in part:

when a man and a woman are legally married; it therefore does not apply to concubines or so called common-law spouses.⁷ Furthermore, like all evidentiary privileges, this privilege may be waived.⁸ As a general proposition a defendant's failure to assert the privilege by way of objecting to the testimony of his spouse constitutes a waiver of the privilege.⁹ However, by failing to object to the mere calling of the spouse, the defendant does not waive his right to object to that spouse's testimony regarding private conversations.¹⁰

Louisiana Revised Statutes 15:461 contains two privileges, a defendant's privilege and a witness's privilege. The first is found in section 461(1). Under that section, a defendant in a criminal case has the privilege of excluding testimony regarding private communications that the defendant and the defendant's spouse shared during the course of their marriage. Thus, the defendant may object only to testimony about private conversations; he may not object to testimony about other matters between them during the course of the marriage.¹¹ The term "private conversations" in this context refers to oral communications only and does not include letters or notes sent between the spouses.¹² Further, in order to be within the scope of the privilege, the conversation must have been made under circumstances in which other persons were not present or could not have been expected to hear what was said. Conversations that are conducted in the presence of third persons or in crowded public places and that can therefore be easily overheard are

The competent witness in any criminal proceeding, in court or before a person having authority to receive evidence, shall be a person of proper understanding, but:

- (1) Private conversations between husband and wife shall be privileged.
- (2) Neither husband nor wife shall be compelled to be a witness on any trial upon an indictment, complaint or other criminal proceeding, against the other. . . .

7. *State v. Kaufman*, 331 So. 2d 16 (La.), cert. denied, 429 U.S. 981, 97 S. Ct. 495 (1976), discussed in Pugh & McClelland, *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 La. L. Rev. 575, 594 (1977), reprinted in G. Pugh, *Louisiana Evidence Law* 214 (Supp. 1978).

8. See generally La. R.S. 15:478 (1981).

9. See generally La. Code Evid. art. 103 and La. Code Crim. P. art. 841 for the need for a timely objection in order to raise an evidentiary error on appeal. See also *State v. Adams*, 394 So. 2d 1204 (La. 1981); *State v. Bennett*, 357 So. 2d 1136 (La. 1978), discussed in Pugh & McClelland, *Work of the Louisiana Appellate Courts, 1977-1978 Term—Evidence*, 39 La. L. Rev. 955, 978 (1979).

10. *State v. Smith*, 489 So. 2d 255 (La. App. 5th Cir. 1986).

11. *Adams*, 394 So. 2d 1204. The literal language of Revised Statutes 15:461(1) refers to all "private conversations" between spouses, not only those between a defendant and spouse.

12. *State v. Morgan*, 147 La. 205, 84 So. 589 (1920); *State v. Fuller*, 454 So. 2d 119 (La. 1984); *State v. Strong*, 463 So. 2d 830 (La. App. 2d Cir.), writ denied, 466 So. 2d 1300 (1985).

not private.¹³ However, in the absence of evidence to the contrary, communications between spouses are presumed to be private.¹⁴ In order to rebut this presumption of confidentiality, the state may introduce evidence showing the presence of a third person. In such situations, the burden then shifts to the defendant to show that the conversation was in fact private.¹⁵

This privilege appears to admit of no clear-cut exceptions. For example, there is no exception to this privilege when the spouse is a victim of a crime of violence committed by the defendant-spouse. Although dictum in an older Louisiana case suggested that there are strong reasons for creating such an exception, apparently no court has taken up this suggestion.¹⁶ There does appear, however, to be a statutory exception to the rule regarding confidential communications contained in Revised Statutes 14:403(F), which provides for a suspension of the privilege in any proceeding concerning the abuse of a child.¹⁷ A Louisiana appellate court considered this provision in *State v. Smith*¹⁸ but failed to resolve the question whether this statute created an exception to the section 461(1) privilege.¹⁹

The second spousal privilege, the witness's privilege, is provided for in Louisiana Revised Statutes 15:461(2). Under this section, a witness who is called to testify against his spouse may refuse to do so. This privilege resides in the witness himself; hence, only the witness may waive it. So, for example, if a spouse-witness voluntarily agrees to testify

13. *State v. Landry*, 502 So. 2d 281 (La. App. 3d Cir.), writ denied, 508 So. 2d 63 (1987); *State v. Narcisse*, 426 So. 2d 118 (La.), cert. denied, 464 U.S. 865, 104 S. Ct. 202 (1983).

14. *State v. Webb*, 156 La. 952, 101 So. 338 (1924); *Narcisse*, 426 So. 2d 118.

15. See *Narcisse*, 426 So. 2d 118; *State v. Dupuy*, 319 So. 2d 194 (La. 1975), discussed in Pugh & McClelland, *supra* note 7, reprinted in G. Pugh, *supra* note 7, at 213.

16. *State v. Sparacino*, 164 La. 704, 114 So. 601 (1929). Wigmore states that such an exception exists at common law even in the absence of an express statutory provision. 8 J. Wigmore, *Evidence in Trials at Common Law* § 2338 (McNaughton 4th ed. 1961) [hereinafter Wigmore]. See also C. McCormick, *On Evidence* § 84, at 170 (3d ed. 1984) [hereinafter McCormick].

17. La. R.S. 14:403(F), as amended by 1988 La. Acts No. 437, § 1 provides:

In any proceeding concerning the abuse or neglect or sexual abuse of a child or the cause of such condition, evidence may not be excluded on any ground of privilege, except in the case of communications between an attorney and his client or between a priest, rabbi, duly ordained minister or Christian Science practitioner and his communicant, as provided in Subsection B of this Section.

18. 489 So. 2d 255 (La. App. 5th Cir. 1986). Another exception to the privilege is found in La. R.S. 13:1676 (1983) (Uniform Reciprocal Enforcement of Support Act).

19. The court found that the use of the wife's statement violated the discovery-notice requirement. The admission of the husband's conversation with his wife was held to be prejudicial error because without such admission it was the defendant's word against the child's.

for the state, the defendant has no right to prevent the witness from doing so. Although the defendant may not exclude the witness's testimony, he may exercise his right under section 461(1) to prevent the witness from referring to any confidential communications.²⁰

Under the jurisprudence, the state may not call a spouse as a witness when it knows that the spouse will invoke the spousal privilege. This particular rule stems from a broader one, namely, that it is improper for any party to knowingly require a witness to invoke an evidentiary privilege in the presence of the jury.²¹ The American Bar Association Standards for Criminal Justice, on which this rule is based, provide that counsel may not argue any inference from the failure of the other party to call a witness if counsel knows that the failure is based on the witness's claim of privilege.²² Thus, as a general rule, it is improper to comment on a defendant's assertion of any privilege. In keeping with this general rule, the state supreme court has said that it is improper for a prosecutor to comment on the defendant's assertion of a privilege under section 461(1).²³

The witness's privilege, like all other evidentiary privileges, may be waived. Such a waiver occurs as long as the witness testifies voluntarily.²⁴ A trial court is under no duty to tell the spouse-witness about the witness's privilege or even to determine that the witness is aware of the privilege. It has been suggested that, upon request, the court should advise the witness of the existence of the privilege, and this certainly is permissible.²⁵ In an older case, the Louisiana Supreme Court had said that it was not error for the prosecutor to ask a witness whether she knew that she did not have to testify.²⁶ This decision has been criticized and may have been implicitly overruled by the court when it formulated the rule that it is inappropriate to comment on matters of privilege.²⁷

20. *State v. Adams*, 394 So. 2d 1204 (La. 1981) and cases cited therein.

21. *State v. Day*, 400 So. 2d 622 (La. 1981), discussed in Pugh & McClelland, *Developments in the Law, 1981-1982—Evidence*, 43 La. L. Rev. 413, 429 (1982); *State v. Berry*, 324 So. 2d 822 (La. 1975).

22. See Prosecution Function 5.7(c) and Defense Function Standard 7.6(c) located in *The American Bar Association Standards for Criminal Justice*, Vol. I (2d ed. 1980).

23. *State v. Day*, 400 So. 2d 622 (La. 1981); *State v. Bennett*, 357 So. 2d 1136 (La. 1978).

24. *State v. Ward*, 483 So. 2d 578 (La. 1986).

25. *Id.* at 592 (Lemmon, J., concurring). See also Pugh & McClelland, *Developments in the Law, 1985-1986—Part I—Evidence*, 47 La. L. Rev. 297, 300 (1986).

26. *State v. Jacobs*, 281 So. 2d 713 (La. 1973).

27. The *Jacobs* case was criticized in Pugh & McClelland, *The Work of the Louisiana Appellate Court for the 1973-1974 Term—Evidence*, 35 La. L. Rev. 525, 542 (1975), reprinted in G. Pugh, *supra* note 7.

In saying that the issue of privilege is for the court, the supreme court has indicated that it is not a matter for a jury.²⁸

The witness's privilege, it should be noted, does not prevent the defendant from compelling his spouse to testify. On the contrary, the defendant has a right to compel his spouse to testify as a witness.²⁹ Louisiana Revised Statutes 15:461(2) only gives the spouse-witness a right to refuse to testify against the defendant. Where the defendant elects not to call his spouse, may the prosecutor comment that the jury should infer from this inaction that the testimony would have been unfavorable to the defendant? In one case the court ruled that such a comment was not inappropriate.³⁰ It would seem that if the defendant who did not call his spouse to the stand was merely exercising his privilege to exclude private conversations, then the prosecutor's comment would violate the rule announced by the supreme court to the effect that comments on the invocation of a privilege are inappropriate.³¹ On the other hand, if the wife was an eyewitness to the offense and neither spouse said anything about the crime that would qualify as a private conversation, then the older rule apparently could be applied without violating the defendant's rights.

A divorce may or may not be significant in regard to the privilege. Since divorce destroys the spousal relationship, the witness (former spouse) would not be able to invoke the spouse-witness privilege under section 461(2). The privilege accorded private conversations under section 461(1) should be unaffected by divorce, and conversations that occurred while the parties were married should remain privileged. The section 461(1) rule protects private conversations between spouses, and a divorce should have no bearing in this regard.³²

THE PHYSICIAN-PATIENT PRIVILEGE³³

Civil Cases

Louisiana Revised Statutes 13:3734 establishes a broad privilege for

28. *State v. Lee*, 127 La. 1077, 54 So. 356 (1911). See also La. Code Evid. art. 104(A).

29. *State v. Todd*, 173 La. 23, 136 So. 76 (1931), discussed in Comment, Compulsory Testimony of One Spouse in Behalf of the Other in Louisiana Criminal Trials, 6 Tul. L. Rev. 489 (1931).

30. *Todd*, 173 La. 23, 136 So. 76.

31. *State v. Berry*, 324 So. 2d 822 (La. 1975); *State v. Day*, 400 So. 2d 622 (La. 1981).

32. See Wigmore, *supra* note 16, at § 2341; McCormick, *supra* note 16, at § 85.

33. This privilege did not exist at common law but was created by statute. See *Moosa v. Abdalla*, 178 So. 2d 273 (La. 1965).

communications between the patient and his "health care provider."³⁴

34. La. R.S. 13:3734 (Supp. 1988) provides:

A. As used in this Part:

(1) "Health care provider" means a hospital, as defined in Paragraph (3) hereof, and means a person, corporation, facility, or institution licensed by the state to provide health care or professional services as a physician, hospital, dentist, registered or licensed practical nurse, pharmacist, optometrist, podiatrist, chiropractor, physical therapist, psychologist, or licensed professional counselor and an officer, employee, or agent thereof acting in the course and scope of his employment.

(2) "Patient" means a natural person who receives health care from a licensed health care provider.

(3) "Hospital" means any hospital as defined in R.S. 40:2102; any "Nursing home" or "home" as defined in R.S. 40:2009.2; or any health care provider's offices or clinics containing facilities for the examination, diagnosis, treatment or care of human illness.

(4) "Representative" means the spouse, parent, tutor, curator, trustee, attorney or other legal agent of the patient.

(5) "Communication" means the acquiring, recording or transmittal, of any information, in any manner whatsoever, concerning any facts, opinions or statements necessary to enable the health care provider to diagnose, treat, prescribe or to act for the patients; said communications may include, but are not limited to any and all medical records, office records, hospital records, charts, correspondence, memoranda, laboratory tests and results, x-rays, photographs, financial statements, diagnoses and prognoses.

(6), (7) Repealed by Acts 1986, No. 496, § 2, eff. July 2, 1986.

B. Except as hereinafter provided, in civil cases, proceedings before a medical review panel, pursuant to R.S. 40:1299.47 and in medical and dental arbitration proceedings, pursuant to R.S. 9:4230-4236, and in proceedings and investigation preliminary to all such actions, a patient or his authorized representative, has a privilege to refuse to disclose and to prevent a health care provider from disclosing any communication, whenever made, relating to any fact, statement or opinion which was necessary to enable that health care provider or any other health care provider to diagnose, treat, prescribe or act for the patient.

C. There shall be no privilege for any communication under this Section in the following circumstances to the extent indicated:

(1) Either before or after probate, upon the contest of any will executed, or claimed to have been executed, by such patient, or after the death of such patient, in any action involving the validity of any instrument executed, or claimed to have been executed by him, conveying or transferring any immovable or movable property, any health care provider who has attended said patient may disclose any communication regarding the patient which was necessary to enable him to diagnose, treat, prescribe or to act for such deceased.

(2) After the death of the patient, the executor of his will, or the the administrator of his estate, or the surviving spouse of the deceased, or if there be no surviving spouse, the children of the deceased personally, or if minors, by their representative, may give such consent, in any action or proceeding brought to recover damages on account of the death of the patient, to permit any health care provider who may have attended said patient at any time to disclose any communication regarding said patient which was necessary to enable

The term "health care provider" embraces not only natural persons, but also corporations, facilities, or institutions licensed by the state to provide health care or professional medical services. Further, the group of natural persons to which the umbrella term "health care provider" applies is not limited to physicians. That group includes, for example, pharmacists, podiatrists, chiropractors, and physical therapists. Finally, the term also extends to officers, employees, or agents of the entities that are covered by the privilege.

Under this statute a patient or the patient's representative may refuse to disclose and may prevent a health care provider from disclosing any "communication" between himself and the provider, regardless of when the communication was made. As defined in the statute, "communication" means the acquisition, recording, or transmission of any fact, statement, or opinion that was necessary to enable any other health care

him to diagnose, treat, prescribe or act for such deceased.

(3) If any person brings an action to recover damages, in tort or for worker's compensation under federal or state laws, for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any health care provider who has attended such person at any time may disclose any communication which was necessary to enable him to diagnose, treat, prescribe, or act for said patient.

(4) The bringing of an action to recover for the death of a patient by the executor of his will, or by the administrator of his estate, or by the surviving spouse, or, if there be no surviving spouse, by the children personally, or, if minors, by their representative, shall constitute a consent by such executor, administrator, surviving spouse, or children or representative to the disclosure of any communication by any health care provider who may have at any time attended said deceased.

(5) If any health care provider reasonably believes in good faith that any legal proceeding enumerated in Paragraphs (3) or (4) under this Subsection has or may be instituted for or on behalf of said patient, such health care provider may disclose any communication acquired by him which was necessary to enable him to diagnose, treat, prescribe, or act for said patient.

D. Any action or proceeding described in Subsection C of this Section which constitutes a consent for a health care provider to testify at a trial on the merits shall be deemed a consent for purposes of any discovery method authorized by Articles 1421 et seq. of the Louisiana Code of Civil Procedure.

E. Nothing in this Section shall preclude the health care provider from disclosing privileged information by medical report either before or after any legal proceedings are instituted, provided that he is in receipt of a written authorization executed by the patient. Furthermore, when a patient is represented by an attorney and that attorney provides the health care provider with written authorization executed by the patient, the health care provider may disclose to the attorney any communication which was necessary to enable him to diagnose, treat, prescribe, or act for the patient and may provide to the attorney, as agent for the patient, any medical reports, x-rays, or any other written information the health care provider has regarding the patient, all without the necessity of complying with formal discovery.

provider to "diagnose, treat, prescribe or to act for the patients."³⁵ This privilege applies, with a few notable exceptions, to all civil cases, to proceedings before medical review panels, to medical and dental arbitration proceedings, and to investigations preliminary to such proceedings. The proceedings excepted from the application of the privilege fall into three categories:

1. Will contests and other actions brought after the death of the patient involving the validity of an instrument that the patient allegedly executed and that conveys or transfers property.
2. Actions brought after the death of the patient to recover damages for the death of the patient. Under this exception certain persons such as the executor, administrator, spouse, or children of the decedent are authorized to give their consent to the disclosure of communication. In such suits the defendant may rely on this consent of the plaintiff in order to offer communications between patient and health care provider.
3. Personal injury actions, whether in tort or workers' compensation, brought by the patient. According to the statute, in such cases the plaintiff impliedly consents to the disclosure of communications.

In addition to these exceptions, the statute protects the health care provider by allowing disclosure when the health care provider "in good faith reasonably believes" that an action listed in exceptions 2 or 3 above, has been or will be brought.

Generally speaking, Louisiana courts have been reluctant to create additional exceptions to the statute.³⁶ For example, in *Vincent v. Lemaire*³⁷ the plaintiff, after obtaining a separation, brought suit for partition of the community. The only asset available for distribution was \$200,000 in cash, which the defendant had received in settlement of a personal injury claim. In order to determine how much of that settlement was community property, the court had to consider the extent of pain and suffering that the husband endured before the marriage was dissolved. The wife sought to depose the husband's psychiatrist, presumably to gain information regarding the husband's mental suffering. The court, however, rejected this attempt, stating that there was no exception for this information under the privilege statute. The court refused the wife's suggestion that it fashion a new exception analogous to the existing statutory exception for personal injury actions brought by patients.

35. *Id.*

36. For another statutory exception, see La. R.S. 14:403(F), as amended by 1988 La. Acts No. 437, quoted at *supra* note 17. Compare *State v. Bellard*, 533 So. 2d 961 (La. 1988) with *Matherne v. Hannan*, 534 So. 2d 991 (La. App. 4th Cir. 1988).

37. 370 So. 2d 190 (La. App. 3d Cir. 1979).

Paragraph D of section 3734 provides that when, in an action under a listed exception, the patient is deemed to consent to disclosure at the trial, the information may be disclosed during discovery. Under paragraph E, a patient's attorney may secure privileged information from the health care provider if he provides the health care provider with written authorization executed by the patient. The courts have not been rigid in terms of the timing and method of disclosure. Generally, when disclosure is authorized and the doctor can give the information by way of a deposition or subsequently by testimony at trial, disclosure at other times and by other means does not violate the privilege.³⁸

There have been several cases involving claims of improper disclosure. It has been held that a doctor does not violate the privilege by discussing a patient's physical condition with lawyers defending against a patient's suit to recover damages for personal injury. Although, technically, the doctor is authorized to disclose communications in a civil proceeding or in a deposition, the fact that disclosure was made in a conversation with lawyers involved in the case was held not to violate the privilege.³⁹

While the statute provides for a release of information under each of its exceptions, it does not authorize the release of the patient's entire medical history. The information sought by the defendant must be pertinent to the defense of the case.⁴⁰

The physician-patient privilege, like the spousal privilege, must be timely asserted, and the failure to do so constitutes a waiver. The waiver need not be express. It should be noted that while the privilege applies in all civil proceedings, including interdiction proceedings, courts must exercise care in attempting to show an implied waiver in these situations. In one recent interdiction case,⁴¹ the court held that the failure of the patient's appointed counsel to object to the taking of the deposition of the patient's doctors did not waive the physician-patient privilege. The court further held that there was no waiver merely because the patient's private attorney subsequently took the deposition of the patient's doctors.⁴²

Precisely what types of patient conduct give rise to an implied waiver of the privilege is not clear. The courts, for example, have struggled with the question of whether a waiver should be inferred when the patient's pleadings in a particular case effectively put his physical or

38. *Glenn v. Kerlin*, 248 So. 2d 834 (La. App. 2d Cir. 1971); La. R.S. 13:3734(D) (Supp. 1988).

39. *Glenn*, 248 So. 2d 834.

40. *Williams v. Sistrunk*, 417 So. 2d 14 (La. App. 4th Cir. 1982); *Acosta v. Cary*, 365 So. 2d 4 (La. App. 4th Cir. 1978).

41. *Interdiction of Haggerty*, 485 So. 2d 67 (La. App. 4th Cir. 1985).

42. *Id.*

mental condition in issue. In *Arsenaux v. Arsenaux*,⁴³ the court left the matter open. In that case, a wife sued for separation without fault, and the husband reconvened for divorce claiming that the wife was at fault in the breakup of the marriage. To support his claim the husband wanted to show that the wife had had an abortion two years after he had a vasectomy, an operation that would have made it impossible for him to impregnate her. In a 4-3 decision, the Louisiana Supreme Court held that the wife's medical records were inadmissible under Revised Statutes 13:3734. The court found initially that this action, the wife's separation action, did not fall within any of the specifically enumerated exceptions listed in the statute. Further, the court concluded that the wife did not waive her privilege by filing for separation and claiming that she was free from fault. Thus, the majority evidently rejected the notion that a patient, merely by presenting some claim to which his mental or physical condition at some time might be relevant, waives the patient-provider privilege. The court's analysis of the problem, however, raises the question of whether the privilege would have been waived if the wife's physical condition had been an element of her suit. Arguably, if the condition had been an element of the suit, the court would have found that the evidence was not privileged.⁴⁴ The court did allude to the woman's constitutional right to privacy, although the court did not explain how that right is relevant to the issue of disclosure.

At first glance, *Arsenaux* appears to be inconsistent with the later case of *Dawes v. Dawes*.⁴⁵ In that case, the plaintiff filed a motion to amend a joint custody decree. In the trial court, the plaintiff, the mother of the child, successfully subpoenaed the father's prescription and hospital records from the DePaul and Ochsner Hospitals. On appeal, the fourth circuit held that these materials were not protected by the patient-health care provider privilege. The court pointed to amended Civil Code article 146, which specifically provides that the mental and physical health of the parties should be taken into account in formulating and adjusting joint custody decrees. This case, then, is distinguishable from the *Arsenaux* case. The *Dawes* holding rests upon the specific wording of article 146; it does not stand for the broad proposition that in any case in which a party's mental or physical condition is an issue, the patient-health care provider privilege would not apply.

43. 428 So. 2d 427 (La. 1983), discussed in Pugh & McClelland, Developments in the Law, 1982-1983—Evidence, 44 La. L. Rev. 335, 345 (1983) and Note, The Louisiana Supreme Court and the Physician-Patient Privilege: *Arsenaux v. Arsenaux*, 44 La. L. Rev. 1813 (1984).

44. In an earlier case, the court of appeal for the first circuit reached the same result in a custody suit. *Wing v. Wing*, 393 So. 2d 285 (La. App. 1st Cir. 1980).

45. 454 So. 2d 311 (La. App. 4th Cir. 1984).

Criminal Cases

The privilege for communications between physician and patient in criminal cases is contained in Louisiana Revised Statutes 15:476. In some respects, this privilege is narrower than that which obtains in civil cases. First, the privilege applies only to communications that are shared between the physician and the patient. Presumably the term "physician" is much narrower than the term "health care provider," which appears in the statute that creates the privilege for civil cases. As was noted above, "health care provider" includes not only physicians but also such entities as hospitals. Second, the statute that sets forth the privilege for criminal cases refers to the "employment" of the physician, suggesting that the privilege applies only when a person seeks to use the services of a physician. The protection afforded by the civil statute may extend to situations in which the patient and health care provider have no such direct relationship. Third, the criminal statute specifically provides that the physician-patient privilege does not apply to information obtained through court-ordered examinations or diagnostic tests.⁴⁶

In some respects, however, the physician-patient privilege for criminal cases may be broader than that for civil cases. For example, the privilege for criminal cases is not limited to communications but applies to "any information" that the physician may have obtained by reason of his serving in that capacity. The privilege thus seems to cover information obtained from persons other than the patient himself. Further, the physician-patient privilege for criminal cases applies in *all* criminal proceedings.⁴⁷ The statute creates no exceptions for certain cases as does the statute that sets forth the civil privilege. As in civil cases, it is the patient's privilege and not the doctor's.

In order for the physician-patient privilege to apply to the information at issue, that information must have been developed within the context of a physician-patient relationship. This seems to suggest that the doctor must have been consulted for the benefit of the defendant. Where the doctor conducts an examination in order to benefit the state, that is, to help support the state's case or to assure that the defendant is competent to make a confession, the information uncovered by the

46. Although the subject is beyond the scope of this article, it should be noted that there are possible self-incrimination problems when a court-ordered examination is conducted in violation of the defendant's right to counsel or without observance of the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). See *State v. Felde*, 422 So. 2d 370 (La. 1982).

47. But see La. R.S. 403(F), as amended by 1988 La. Acts No. 437, and *State v. Bellard*, 533 So. 2d 961 (La. 1988).

doctor is not privileged.⁴⁸ This rule holds regardless of whether the defendant was in custody at the time of the examination.⁴⁹

Problems have arisen when the information developed within the context of the physician-patient privilege is contained in a hospital record. The supreme court, in one case, stated that the privilege created by Revised Statutes 15:476 does not extend to hospital records that are otherwise admissible under Revised Statutes 13:3714. In reaching this result the court concluded that the latter statute, by authorizing the admission of hospital records, creates an exception to both the hearsay rule and the physician-patient privilege, either of which might otherwise serve to exclude such documents.⁵⁰ In subsequent cases, however, the supreme court has limited the rule of that decision. For example, the court has held that even if hospital records are admissible under section 3714, testimony by a physician in lieu of the records is not.⁵¹ The court has also stated that section 3714 does not apply to all medical records, but only to hospital records. More recently, in *State v. Carter*,⁵² the supreme court apparently rejected its earlier construction of section 3714. In that case, the court stated that the hospital records rule was not designed to permit the state to avoid the privilege "by including confidential privileged communications in otherwise admissible records."⁵³ At least one circuit court, however, has refused to follow *Carter* on this point. In *State v. Berluchaux*,⁵⁴ the first circuit concluded that the supreme court's statement in *Carter* was dictum and therefore did not bind lower courts. However, even under the interpretation of section 3714 proposed in *Carter*, the evidence at issue in *Berluchaux* would have been admissible. According to *Carter*, communications that appear in hospital records remain protected by the physician-patient privilege. The record admitted in *Berluchaux*, which contained only the results of an alcohol analysis performed on the defendant's blood, did not include such confidential information.

48. *State v. Berry*, 324 So. 2d 822 (La. 1975), discussed in Pugh & McClelland, supra note 7, reprinted in G. Pugh, supra note 7, at 211.

49. *Berry*, 324 So. 2d at 828.

50. *State v. O'Brien*, 232 So. 2d 484 (La. 1970), discussed in Pugh, Work of the Louisiana Appellate Courts, 1969-1970 Term—Evidence, 31 La. L. Rev. 381, 383 (1971), reprinted in G. Pugh, supra note 5, at 171.

51. *State v. Walker*, 376 So. 2d 92 (La. 1979).

52. 383 So. 2d 357 (La. 1980).

53. There is an apparent conflict between La. R.S. 15:476 (1981) and La. R.S. 13:3714 (Supp. 1988). Section 3714 provides for the admissibility of hospital records, without qualification. Section 476 provides for a privilege for confidential communications between a patient and his physician, again without qualification. In *Carter*, the supreme court attempted to reconcile the two statutes by stating that the hospital records hearsay exception in section 3714 does not apply to statements in a hospital record that are privileged under section 476.

54. 522 So. 2d 600 (La. App. 1st Cir. 1988).

Like other privileges, the physician-patient privilege for criminal cases is waived if not asserted.⁵⁵ Although the statute makes no such provision, the Louisiana Supreme Court has ruled that a defendant impliedly waives the physician-patient privilege when he makes his physical or mental health an issue in the case.⁵⁶ This waiver, however, only applies to information that is relevant to the health issue and not to that which is relevant to other issues in the case. In reaching this decision, the court analogized Revised Statutes 15:476 to Revised Statutes 13:3734. Because the latter statute applies to plaintiffs, not to defendants, one may question the soundness of the court's analogy.

Where the defendant places his mental or physical health in issue and offers expert testimony to support his position, the waiver doctrine applies not only to information possessed by those physicians who testify on his behalf, but also to any medical information, including that obtained through prior medical examinations. The theory underlying this rule is that the defendant should not be permitted to offer favorable information regarding his physical or emotional condition and then to cut the state off from access to unfavorable information on that same subject. This implied waiver theory was applied in *State v. Aucoin*⁵⁷ notwithstanding the fact that the doctor called by the state had been engaged by the defendant to render professional services after the defendant was charged with the offense. The courts have suggested that the trial court, before admitting evidence under the implied waiver theory, should weigh the prejudicial effect of such evidence against its probative value.⁵⁸ In performing this balancing analysis, the court should consider these factors:

1. Would disclosure undermine the physician-patient relationship "by creating the widespread public impression that the privilege is ineffectual"?
2. Would the evidence, by virtue of its possible relevance to nonhealth issues, damage the defense?
3. Were the examination and the commission of the crime remote from each other in time?
4. Might the evidence lead the jury to a guilty verdict by creating the impression that the defendant is a bad or dangerous person?⁵⁹

Whether the rule of *Aucoin* will be extended to a case in which the psychiatrist is still treating the defendant at the time of trial is an open question.

55. *State v. McCoy*, 109 La. 682, 33 So. 730 (1903).

56. *State v. Berry*, 324 So. 2d 822 (La. 1975).

57. 362 So. 2d 503 (La. 1978).

58. *Id.* at 506.

59. *Id.*

ATTORNEY-CLIENT PRIVILEGE

Introduction

The attorney-client privilege applies in both civil and criminal cases.⁶⁰ The privilege enables the client not only to prevent his attorney from disclosing privileged information, but also to shield himself from questions regarding what he told his attorney. If the client does not object to the disclosure, he waives the privilege. The privilege may be impliedly waived in some circumstances, as, for example, when a client testifies regarding statements made by his attorney. Similarly, a client who injects an alibi issue into the case, for example, by testifying in support of an alibi defense, may thereby open the door to questioning regarding whether he told his lawyer about the persons in whose company he claimed to be at the time of the crime.⁶¹ However, a disclosure by the attorney without the client's consent does not constitute a waiver. The privilege belongs to the client alone.⁶² Such disclosure is improper because there are circumstances when the client may not be in a position to assert his privilege and his attorney is under a duty to assert the privilege on the client's behalf.⁶³

Ordinarily, the privilege does not apply to the "fact of representation," that is, to the fact that the attorney has counseled or represented the client. Consequently, an attorney may be compelled to reveal the identity of his client.⁶⁴ Relying upon this rule, Louisiana courts have

60. La. R.S. 15:475 (1981) provides:

No legal advisor is permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication made to him as such legal advisor by or on behalf of his client, or any advice given by him to his client, or any information that he may have gotten by reason of his being such legal advisor.

La. R.S. 13:3734.3 (Supp. 1988) provides:

No attorney or counselor at law shall give evidence of anything that has been confided to him by his client, without the consent of such client; but his being employed as a counselor or attorney does not disqualify him from being a witness in the course in which he is employed.

See generally, Comment, Purpose and Extent of the Attorney-Client Privilege in Louisiana, 18 La. L. Rev. 162 (1957), reprinted in G. Pugh, *supra* note 5, at 155.

61. *State v. Vassel*, 285 So. 2d 221 (La. 1973). In *Vassel*, the objection to the question came after it had been answered.

62. In this regard see *State v. Maillian*, 464 So. 2d 1071 (La. App. 1st Cir.), writ denied, 469 So. 2d 982 (1985), where the defendant-wife was not allowed to claim the victim-husband's attorney-client privilege. The husband's attorney was called by the state to testify to facts about the spouses' legal separation in order to show motive.

63. *State v. Morris*, 259 La. 1001, 254 So. 2d 444 (1971), cert. denied, 406 U.S. 959, 92 S. Ct. 2066 (1972).

64. *State v. Pike*, 343 So. 2d 1388 (La. 1977).

upheld the practice of calling the defendant's former attorney in a habitual offender proceeding to prove that the defendant had been previously convicted of a particular offense.⁶⁵ Requiring the attorney to supply such information, however, seems to go far beyond merely requiring him to identify the client. Recently, courts and commentators have begun to question whether this identification rule ought to be absolute or ought to be subject to certain exceptions.⁶⁶

Civil Cases

In 1984, during the revision of the Civil Code and the rearrangement of some of its sections, the legislature inadvertently repealed the article that set forth the attorney-client privilege for civil cases, article 2283. In 1986, the legislature corrected this oversight by enacting Louisiana Revised Statutes 13:3734.3, a verbatim copy of former article 2283.⁶⁷

In contrast to its criminal law counterpart,⁶⁸ this provision provides that no attorney or counselor at law shall give evidence of anything confided to him by the client. At first blush the privilege for civil cases would seem to be somewhat narrower than that for criminal cases. First, the civil privilege prohibits the giving of evidence rather than the making of disclosures. Second, the civil privilege relates to things confided to the attorney by the client, while the criminal privilege covers not only client communications but also advice that the attorney renders to the client and any information learned by the attorney during the course

65. *State v. Bennett*, 357 So. 2d 1136 (La. 1978); *State v. Hayes*, 324 So. 2d 421 (La. 1975), cert. denied, 425 U.S. 962, 96 S. Ct. 1747 (1976). See also La. R.S. 15:529.1(F) (1981), which provides for the admissibility of certificates from the clerk of court or warden as prima facie evidence of imprisonment or discharge of a person.

66. Recently, a great deal of attention has been focused on the case of *Baltes v. Doe*, 44 Cr. L.R. 2079 (Nov. 2, 1988), Fla. Cir. Ct. 15th Judicial Circuit No. CL-88 1145-AD (Oct. 13, 1988), in which an attorney, whose client allegedly was involved in a fatal hit and run accident, refused to disclose the identity of that client. Law enforcement agencies were not able to discover the identity of the driver of the car. In a suit brought by the family of the decedent, the plaintiffs attempted to compel the attorney to disclose his client's name. Thus far, the Florida courts have refused to compel disclosure and have respected the attorney's claim of privilege. In this case, if the attorney were to identify the client, he would be saying much more than "This person is my client." He would, in effect, be acknowledging that this person told him he was the driver of the car that struck and killed the decedent. In this unusual context, the Florida courts have indicated the usual rule does not apply. See also *In re Grand Jury Proceedings v. Jones*, 517 F.2d 666 (5th Cir. 1975); *In re Grand Jury Proceedings v. Pavlick*, 663 F.2d 1057 (5th Cir. 1981).

67. La. R.S. 13:3734.3 (Supp. 1988), quoted at *supra* note 60. See also *New Orleans Saints v. Guesedieck*, 615 F. Supp. 59 (E.D. La. 1985), *aff'd*, 740 F.2d 1249 (5th Cir. 1986).

68. The attorney-client privilege for criminal cases is contained in La. R.S. 15:475 (1981). See the discussion of this privilege at *infra* text accompanying notes 82-100.

of representation. Because the disclosure of advice given by an attorney to a client may directly or indirectly result in the revelation of confidences given by the client to the attorney, one could argue that the civil privilege, like its criminal analogue, ought to extend to such advice as well as to the client communications themselves.

Like the criminal privilege, the civil privilege protects only those communications that the client makes with an expectation of confidentiality. Thus, if an attorney receives a telephone call from his client while a third person is present in his office, the privilege will not be destroyed on that account. This is so because a client has a reasonable expectation of privacy when placing a call to his attorney over the telephone.⁶⁹ However, when an attorney sends a letter or a copy of a letter that he originally sent to the client to an expert witness, the information contained in that letter or copy is not a privileged communication, and the attorney-client privilege does not apply.⁷⁰

It has been said in regard to the attorney-client privilege in criminal cases that generally the identity of the client is not protected by the privilege and disclosure can be compelled.⁷¹ An interesting related question arose in a civil case whether the attorney can be compelled to disclose the whereabouts of his client.⁷² In *Scaccia v. Lowe*,⁷³ the wife allegedly absconded with her child, thereby frustrating the husband's visitation rights. After trying unsuccessfully to persuade the wife's attorney to divulge her location, the husband sued the attorney in tort. The court concluded that the husband had no cause of action against the attorney, but indicated in dictum that the husband might be able to obtain some measure of relief by filing a rule to show cause in the court that awarded custody. Although the court did not say so expressly, it implied that that court might be able to compel disclosure.

The attorney-client privilege remains in effect after the attorney-client relationship has ceased. In other words, any privileged information that the attorney learns during the course of representation ordinarily remains privileged after the relationship has ended. Some jurisdictions, however, have recognized an exception to this rule for cases involving the interpretation, implementation, or effectiveness of a deceased client's testament. In some of these states the exception is absolute; discovery of the client's communications to the attorney concerning the testament is always permitted. Other states have drawn the exception more narrowly, disallowing discovery (that is, upholding the privilege) if the

69. *Divincenti v. Redondo*, 486 So. 2d 959 (La. App. 1st Cir. 1986).

70. *DeSalvo v. Rizza*, 272 So. 2d 27 (La. App. 4th Cir. 1972).

71. *State v. Pike*, 343 So. 2d 1388 (La. 1977). See *supra* note 64 and accompanying text.

72. There seems to be no comparable case on the criminal side.

73. 445 So. 2d 1324 (La. App. 4th Cir. 1984).

person seeking disclosure takes a position adverse to the testamentary dispositions. In an early case, the supreme court adopted this narrower view.⁷⁴ More recently, in *Succession of Norton*,⁷⁵ the court reaffirmed the exception in general, but declined to choose between the competing versions. In that case, the parties seeking to overcome the privilege wished to uphold and carry out the decedent's testamentary dispositions. Consequently, the court found it unnecessary to determine whether discovery might be barred in those instances where the parties seeking disclosure wish to break the testament.

Problems associated with the application of the attorney-client privilege in civil cases often arise during the discovery phase of an action. One such problem, illustrated by the following scenario, is whether and under what circumstances the privilege may be interposed as a bar to discovery. The victim of a personal injury brings suit against the defendant, who promptly turns over the defense of the case to his insurer. At the close of trial, the court enters a judgment against the insured that exceeds the policy limits. The insured then sues his insurer, alleging that the insurer improperly and negligently handled the case. In order to build his case against the insurer, the insured seeks to discover the file prepared by the lawyer during the first trial. The insured, however, resists this demand on the ground that the file is protected by the attorney-client privilege. When the lawyer prepared that file, he of course represented both the insurer and the insured. Because that is so, neither client should be able to claim the attorney-client privilege against the other. When an attorney represents more than one client, he is obligated to give requested information to both of them in the absence of any agreement to the contrary; neither client can preclude the attorney from disclosing information to the other.⁷⁶ Thus, the rule is that when an attorney represents several parties in a transaction, communications made to him by one party generally are not privileged as to the other party and, in a subsequent suit between the parties, either may discover the other's communications with the attorney.⁷⁷

Another problem arising during the discovery process is the relationship between the attorney-client privilege and the work product privilege. Information and materials which fall within the attorney-client privilege are generally exempt from discovery. While the court may determine that evidence is not protected by the attorney-client privilege,

74. *Hart v. Thompson's Ex'r*, 15 La. 88 (1840).

75. 351 So. 2d 107 (La. 1977).

76. *Cousins v. State Farm Mut. Auto. Ins. Co.*, 258 So. 2d 629 (La. App. 1st Cir. 1972); *Brasseaux v. Girouard*, 214 So. 2d 401 (La. App. 3d Cir. 1968).

77. *LeBlanc v. Broussard*, 198 So. 2d 193 (La. App. 3d Cir. 1967); *Marcuse v. Kramer*, 5 Orl. App. 247 (La. App. 1908).

the evidence may be protected by the work product privilege. Several cases have turned on the distinction between the attorney-client privilege and the work product privilege.⁷⁸ The two, while not necessarily mutually exclusive, are certainly not completely interdependent. There may be circumstances in which the admission of certain evidence would violate the work product rule but not the attorney-client privilege. The converse is also true; evidence may be excludable under the attorney-client privilege but yet not be classified as work product. For example, information that the attorney simply receives from the client falls within the scope of the attorney-client privilege; however, because the attorney has no part in producing this information, it cannot be regarded as part of his work product.⁷⁹

Notwithstanding the rules described above, it seems that the trial court has considerably more flexibility in determining whether to apply the civil law privilege than it has in determining whether to apply the criminal law privilege, although the cases on this subject are few. The courts have indicated that the trial court may refuse to honor a claim of privilege when to do so would totally preclude the opposing party from obtaining and introducing evidence that is critical to his case. In one such case, the evidence that the defendant needed to establish his claim was under court seal in federal court. The only way in which the defendant could get access to the information was through documents that were protected by the plaintiff's attorney-client privilege. The appellate court worked out an interesting solution to the problem. It ordered the trial court to conduct an in-camera screening of the documents in the presence of counsel for both parties in order to determine whether the information was privileged, and if so, whether the crime-fraud exception applied.⁸⁰

Finally, it should be noted that when the attorney-client privilege is applicable, as described above, it does not altogether disqualify counsel from testifying as a witness; rather, it merely restricts the subjects about which he may testify. However, when counsel is called upon to testify in a case in which he represents one of the parties, substantial ethical considerations may come into play.⁸¹

78. *Federal Deposit Ins. Corp. v. Butler*, 488 So. 2d 741 (La. App. 4th Cir. 1986). Work product is protected from discovery in Louisiana by Code Civ. P. art. 1424.

79. One question that Louisiana courts have not resolved is whether communications made by company officials to in-house counsel are protected by the attorney-client privilege in either the discovery phase or at the trial. In one recent case an appellate court declined to state an authoritative rule for those situations. *W.L. Somner Co. v. Pacific-Atlantic Oil*, 522 So. 2d 1335 (La. App. 5th Cir. 1988).

80. *In re Kohn*, 357 So. 2d 279 (La. App. 4th Cir. 1978).

81. *Sullivan v. Welch*, 328 So. 2d 731 (La. App. 3d Cir. 1976); *Gutierrez v. Travelers Ins. Co.*, 358 So. 2d 349 (La. App. 4th Cir. 1978).

Criminal Cases

Louisiana Revised Statutes 15:475 provides that communications between a "legal advisor" and his client are privileged. By using the unusual term "legal advisor," the legislature may have been attempting to extend the privilege to communications made to persons other than licensed lawyers.⁸² The statute also provides that the privilege remains in effect beyond the period during which the attorney represents the client. While the privilege applies after the relationship has terminated, it includes only those communications and that information acquired by counsel during the period of representation. It does not apply to communications and information acquired by counsel after representation has been terminated. Further, the statute makes it clear that the privilege applies not only to communications made by the client to the attorney, but also to any advice given by the attorney to the client and to any information that the attorney may have acquired by reason of being the client's legal advisor.

The prerequisites for the application of the attorney-client privilege were discussed at length in *State v. Green*.⁸³ First, there must be an attorney-client relationship, that is, the person asserting the privilege must show that he sought and received the advice and assistance of an attorney. Although the term "received" is usually included in defining the attorney-client relationship, this reference is misleading. It is not necessary that the attorney actually give any advice. For example, when a prospective client discusses a case with an attorney for the purpose of obtaining representation by that attorney, and the attorney nevertheless declines the case, their conversation falls within the scope of the privilege. Consequently, it is more accurate to say that the critical factor in determining whether an attorney-client relationship exists is whether the advice sought is from a professional acting in that capacity.⁸⁴ Under this standard, if a person merely discusses a matter in the presence of an attorney or even discusses the matter with the attorney himself, but makes no effort to seek advice or otherwise to establish a professional relationship with the attorney, then no attorney-client relationship arises. Similarly, information given by one inmate to a fellow inmate who works in the prison library is not within the privilege if the person who conveys the information knows that the other person is an inmate and not an attorney.⁸⁵

82. For example, a lay person who holds himself out as being duly licensed to practice law, but in fact is not, may arguably be within the term "legal advisor."

83. 493 So. 2d 1178 (La. 1986), noted in Note, A First Step Toward Resolution of the Physical Evidence Dilemma: *State v. Green*, 48 La. L. Rev. 1019 (1988).

84. *Id.* at 1180-81.

85. *State v. Spell*, 399 So. 2d 551 (La. 1981), discussed in Pugh & McClelland, *supra* note 21, at 431.

The second prerequisite for the application of the privilege is that the communication be given in confidence. In other words, the client must make the disclosure with some reasonable expectation of confidentiality. Thus, disclosures made in the presence of third parties usually are not privileged.⁸⁶ However, if the third party is assisting counsel or if the third party's presence is required for transmission of the information and the client reasonably expects that the information will remain private, the privilege is not lost. *State v. Montgomery*⁸⁷ demonstrates the application of this principle. In that case the client, who had attempted to call her attorney, was connected with an answering service that had been instructed to get the names of any callers as well as the subject matter of the calls. According to the court, the client's statement to the answering service that "I shot my husband" was privileged.

The third prerequisite is that the communication or information given by the client and the advice given by the attorney be sufficiently connected to the subject matter of the attorney's representation. The test usually used is "whether the statement is made as part of the purpose of the client to obtain advice on the subject."⁸⁸

The attorney-client privilege protects three categories of information. First, it extends to communications made by or on behalf of the client. These may be communicated to counsel orally, in writing, or in any other form. Second, the privilege applies to advice given by counsel to the client, that is, any recommendation regarding a decision or course of conduct. Third, the privilege extends to all information that the attorney has obtained in the course of representing the client. The statute does not explicitly limit the sources from which or the manner in which this information may be received. It is not the information per se that is protected, but the attorney's acquisition of it. What this means is that a party, through other sources, may prove the information in question. The privilege only prevents the party from compelling the client's attorney to disclose the information.

*State v. Victores*⁸⁹ provides an example of the kinds of "information" that fall within the compass of the privilege. In that case a wife testifying against her husband stated that she had not made a "deal" with the state. The next day the wife's lawyer indicated to defense counsel that there may have been such an agreement. According to the court of appeal, the attorney-client privilege precluded the defendant from questioning the wife's lawyer about the deal. But the courts have not been consistent in this regard. The court in *Victores* did not cite an earlier

86. *State v. Wooley*, 523 So. 2d 883 (La. App. 4th Cir. 1988).

87. 499 So. 2d 709 (La. App. 3d Cir. 1986), writ denied, 502 So. 2d 106 (1987).

88. *Green*, 493 So. 2d at 1181 (quoted in *Wooley*, 523 So. 2d at 885).

89. 486 So. 2d 897 (La. App. 1st Cir. 1986).

decision in which the state supreme court, confronted by a similar set of facts, ruled that the defendant should be allowed to call a witness's attorney in order to examine him about plea bargains between the witness and the state. A plea bargain, the supreme court explained, is not designed to be secret or confidential. Plea bargains are not made between the attorney and client but between the client and the prosecutor.⁹⁰ This analysis raises some doubt about what kinds of information learned in the course of representation are within the scope of the privilege.

In another case illustrating the scope of information protected by the privilege, a legal aide lawyer, who had attended a physical lineup in which the defendant had participated, was called by the state to testify regarding the circumstances surrounding the lineup. The lawyer testified that he was routinely present at lineups in order to apprise defendants of their constitutional rights, to consult with them should they so desire, and to assure that the lineups were conducted fairly. He admitted, however, that he was not the counsel of record for the defendant in that case. After hearing this testimony, the trial court permitted the lawyer to describe the lineup. On appeal, the supreme court upheld the trial court's ruling, stating that the attorney merely testified to his observations. In a concurring opinion, however, one justice noted with disapproval that the lawyer's testimony amounted to a disclosure of information obtained during the course of representation and therefore violated the attorney-client privilege.⁹¹

The attorney-client privilege is subject to several exceptions. *State v. Green*⁹² listed and explained the most common exceptions. First, the privilege does not apply when the client consents to the disclosure of the information by his counsel. Second, there is an exception for those situations in which disclosure is mandated by law or court order.⁹³ The third exception, which is discussed more frequently in the jurisprudence than any of the others, is the so-called crime-fraud exception. This exception is applicable when the client seeks representation to further criminal or fraudulent conduct, either past or future. In determining whether this exception applies, the court must focus on the client's intent and action: what did the client seek to achieve by retaining the services of counsel? When a client acts in order to promote or further some criminal or fraudulent enterprise and the attorney undertakes representation innocently, the privilege does not apply. Conversely, if a client

90. *State v. Rankin*, 465 So. 2d 679 (La. 1985).

91. *State v. Jones*, 284 So. 2d 570 (La. 1973) (Barham, J., concurring).

92. 493 So. 2d 1198 (La. 1986).

93. See, e.g., *In re Ryder*, 263 F. Supp. 360 (E.D. Va.); *aff'd*, 381 F.2d 713 (4th Cir. 1967); *In re Price*, 429 N.E.2d 961 (Ind. 1982); *In re Shamey*, 73 N.J. 187, 313 A.2d 655 (1977); *In re Kerr*, 86 Wash. 2d 655, 548 P.2d 297 (1976); A.B.A. Informal Opinion 1057 (Aug. 12, 1968).

seeks legal services for perfectly innocent or legitimate reasons, the wrongful acts of his attorney will not abrogate the privilege. The application of these principles was illustrated in a recent case in which the attorney and client conspired to obstruct justice by hiding evidence of the crime, namely, the gun used to perpetrate the crime. According to the court, the information that the attorney received from the client, including the location of the gun, was not within the attorney-client privilege.⁹⁴

The Louisiana Supreme Court has held that it is improper for a party to call a witness when that party knows that either the witness or the defendant will claim the attorney-client privilege.⁹⁵ A corollary of this rule is that the state may not comment on a defendant's claim of privilege.

At times the application of the attorney-client privilege is complicated by other problems in criminal procedure. For example, the conflict-of-interest problem is not insubstantial. The following simple hypothetical demonstrates the problem and its potential effect on the attorney-client privilege. Two clients, *A* and *B*, are jointly represented by one lawyer. Client *A* tells counsel something that is harmful to his, *A*'s, position but that is beneficial to his co-defendant's, *B*'s, position. For example, *A* may tell his lawyer that he was the one who fired the fatal shot, or that *B* did not want to commit the crime but *A* did. The attorney is then caught in a conflict. Although it might seem that neither client could have a reasonable expectation that his communications would be kept secret from the other in a case of joint representation, the ethical rules that govern attorney conduct mandate a different conclusion. Under those rules, the attorney has a duty to respect *A*'s confidence; however, he also has a duty to do his best for *B*. *State v. Carmouche*⁹⁶ discusses the problem of conflicts. Although not providing substantial guidance to counsel in these situations, the supreme court said that the judge should require an attorney to disclose the basis for conflict.

Appellate courts scrutinize conflict situations with care. For example, in one case, the court said that the lack of effective cross-examination of a witness who was also represented by counsel for the defendant demonstrated the conflict. Since there was no showing of a waiver of the right to conflict-free representation, this was held to be reversible error.⁹⁷ Counsel has an obligation to advise his client of any potential conflict-of-interest and to give the client the opportunity to decide whether

94. *State v. Taylor*, 502 So. 2d 537 (La. 1987), concurring and dissenting opinions, 502 So. 2d 1389.

95. *State v. Berry*, 324 So. 2d 822 (La. 1975).

96. 508 So. 2d 792 (La. 1987).

97. *State v. Ross*, 410 So. 2d 1388 (La. 1982).

to allow counsel to represent him or to employ a new attorney. In the former case, the client must necessarily agree to disclose all information to those whom the attorney jointly represents. In other words, the price to the client of continued representation by the attorney is, in a sense, the waiver of the attorney-client privilege.

In another case, one that presented a rather unusual conflict-of-interest problem, the defense attorney had worked for the victim of the crime before her death. In an effort to establish a motive for the crime, the prosecutor sought to question the attorney regarding the circumstances surrounding the drafting of the victim's will, which named the defendant as a legatee. At a hearing to recuse the attorney, the attorney testified that, in his opinion, his testimony would not "harm" his client. Although the test for determining the propriety of disclosing attorney-client communications is not whether doing so will harm the client, the trial court found that the testimony did not run afoul of the privilege and the court of appeal agreed. The result reached by the courts is probably correct. Because the attorney learned of the information as a result of providing services for the testatrix and not as a result of representing the defendant, that information was not within the attorney-client privilege. The appellate court, however, did not rest its decision upon that rationale. According to the court, the defendant, by choosing the testatrix's lawyer to represent her, waived her privilege.⁹⁸ Although this result might be justified under the facts of the case, it would seem that counsel should have advised the defendant that he might be called as a witness for the state.

Finally, in another recent conflict-of-interest case, the attorney represented codefendants *A* and *B* at their arraignment. *A* subsequently pleaded guilty. At *B*'s trial, the court permitted the attorney to ask *A*, who was appearing as a witness for the state, not only about what *A* stated at arraignment but also about prior inconsistent statements that *A* had made to the attorney during the course of his representation of *A*. The court of appeal, reasoning that the benefit of this testimony to *B* outweighed any harm that *A* might have suffered through the violation of his privilege, upheld the admission of this evidence.⁹⁹

Lurking in the background of these recent conflict-of-interest cases is the problem of squaring the attorney-client privilege with the sixth amendment rights of confrontation and compulsory process. The issue in these cases, strictly speaking, is not whether the information is within

98. *State v. Lambertus*, 482 So. 2d 812 (La. App. 4th Cir. 1986).

99. *State v. Solid*, 529 So. 2d 108 (La. App. 4th Cir. 1988). In this case the attorney himself wanted to testify on behalf of his client as to statements made by *A* to him, but knowing that this would put his client and himself in an awkward position he moved for a mistrial. The court declined the mistrial, and this was held to be no error because the attorney's testimony was merely cumulative.

the scope of the attorney-client privilege. The real question is whether the privilege of one defendant-client must yield to the confrontation and compulsory process rights of another defendant-client. In this regard, one must remember that the rights of confrontation and compulsory process are of constitutional dimension, while privileges such as the attorney-client privilege are either products of the common law or creatures of the legislature.¹⁰⁰ Consequently, when the recognition of the privilege in a particular case would deny a criminal defendant either the right to confront the witnesses against him or the right to subpoena witnesses in his behalf, the interest of the party who is asserting the privilege should have to yield to the interests of the defendant.

CONCLUSION

This article has reviewed the current state of Louisiana law on the three most important general evidentiary privileges: husband-wife, physician-patient, and attorney-client. While many issues arising under these privileges have been settled by the courts, there are still areas of uncertainty that require legislative action. The Louisiana State Law Institute is working on the subject of evidentiary privileges to be included in the Code of Evidence as Chapter 5. During this revision process, the Institute will examine the law of other jurisdictions as an aid in drafting the Louisiana privilege rules. The law of other jurisdictions, while helpful to the revision process, may also be of some benefit to practitioners for comparative purposes in the interim. Thus, as a postscript to this article, the authors have included a short comparison of the Uniform Rules and the Proposed Federal Rules on privileges.

POSTSCRIPT

The Louisiana State Law Institute, in preparing the Louisiana Evidence Code, made reference to the Federal Rules of Evidence as one of its principal points of departure.¹⁰¹ The Federal Rules of Evidence as they were originally proposed by the Advisory Committee contained a set of rules covering the various evidentiary privileges.¹⁰² These rules, while to some extent representing a codification of existing law, did introduce several significant changes. When the rules were sent to Congress they were substantially amended after considerable debate. Only one significant substantive rule survived, rule 501. This rule provides

100. La. Const. of 1974, art. 1, §§ 13, 16; U.S. Const. amend. VI; *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105 (1974).

101. La. Code Evid. art. 101 comment (a).

102. Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315 (March 1971).

essentially that the federal courts should continue to apply the common law, except that in cases where state substantive law applies, such as diversity cases, the courts should apply the evidentiary privileges under the law of the applicable state.¹⁰³ Thus the Federal Rules, as they currently exist, do not represent a significant departure with the past and may not be particularly helpful in preparing evidence articles for inclusion in the Louisiana Code of Evidence. The Federal Rules as they were proposed, however, represented a somewhat different approach to the law of privileges than had been manifested in the past. Rule 501, as originally drafted, provided that no one had a privilege to refuse to be a witness except to the extent provided in the Constitution or by specific act of Congress or as provided in the Rules of Evidence or other rules adopted by the Supreme Court.¹⁰⁴ This general introductory rule set the stage for what was a rather restrictive and narrow approach to the law of privileges. For one thing, it did away with the common law of privileges and with the power of courts to create or expand privileges. Also, by stating a bold rule in the negative, that is, no one may refuse to be a witness or refuse to testify, the rules indicated that the law of privileges should be held within a very limited scope.

This restrictive approach to privileges can be found in the Proposed Federal Rules that deal with the spousal privilege and the physician-patient privilege. Proposed Federal Rule 505¹⁰⁵ sets forth the husband-

103. Fed. R. Evid. 501, as adopted by Congress, provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

104. The Supreme Court rule as submitted to Congress provided:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:

- (1) Refuse to be a witness; or
- (2) Refuse to disclose any matter; or
- (3) Refuse to produce any object or writing; or
- (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

105. Proposed Fed. R. Evid. 505 provides:

(a) **GENERAL RULE OF PRIVILEGE.** An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.

(b) **WHO MAY CLAIM THE PRIVILEGE.** The privilege may be claimed by the accused or by the spouse on his behalf. The authority of the spouse to do

wife privilege. The privilege, which either the defendant or the spouse can invoke, prevents the spouse from *testifying* against the defendant. The rule, however, does not recognize a private communications privilege. Furthermore, like the rules in a number of states, the proposed rule contains two important exceptions: The privilege does not apply (1) when the defendant stands accused of a crime against his spouse or a child, or (2) when the spouse is questioned regarding matters that occurred before the marriage.

The Uniform Rules of Evidence, promulgated by the National Conference of Commissioners on Uniform State Laws (1974), were modeled on the Proposed Federal Rules before their revision by Congress. The Uniform Rules contain a spousal privilege somewhat broader than that contained in Proposed Federal Rule 505. Uniform Rule 504, in its present form, establishes a privilege for confidential communications, one that either spouse may claim. However, several proposed changes to the rule would make it similar to the present law in Louisiana. Under these proposals not only would confidential communications be privileged, there would also be a witness's privilege that would enable the spouse to refuse to testify on any matter. Like the proposed Federal Rule, the Uniform Rule creates an exception to the privilege in cases involving crimes against spouses or children. This aspect of the rule would not be changed by the proposed revisions.

Likewise, Proposed Federal Rule 504 creates a privilege for communications between medical personnel and their patients.¹⁰⁶ As much

so is presumed in the absence of evidence to the contrary.

(c) EXCEPTIONS. There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to marriage, or (3) in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328, with transporting a female in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421-2424, or with a violation of other similar statutes.

106. Proposed Fed. R. Evid. 504 provides:

(a) Definitions.

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

(2) A "psychotherapist" is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the

as any of the other Proposed Federal Rules, this one shows that the drafters of the Federal Rules preferred a narrow and restrictive approach to privileges. Under the proposed rule, there is no general physician-patient privilege. Rather, the privilege accorded by the rule applies only when the physician is a "psychotherapist" and extends only to communications that are made for the purpose of diagnosis or treatment of a mental or emotional condition. The scope of this privilege is further limited by several critical exceptions. First, the privilege does not apply where the patient relies on a mental or emotional condition as an element of his claim. Second, in proceedings to hospitalize a patient for mental illness, the privilege does not extend to any communications relevant to an issue in the case if the doctor determines that the patient is in need of such hospitalization.

The Uniform Rule of Evidence is somewhat similar to the proposed federal rule.¹⁰⁷ However, in an effort to provide a model which is broader

diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) General rule of privilege.—A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Who may claim the privilege.—The Privilege may be claimed by the patient, by his guardian or conservator, or by the person representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

(d) Exceptions.

(1) Proceedings for hospitalization.—There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by order of the judge.—If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) Condition on element of claim or defense.—There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

107. Uniform R. Evid. 503(b) (1974) provides:

General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his [physical,] mental or emotional condition, including alcohol or drug addiction, among himself, his [physician

than the Proposed Federal Rule discussed above, the drafters of the rule set forth two alternative formulations for the class of medical professionals to which the privilege applies—"physician" and "psychotherapist." They also created an option regarding the types of medical conditions covered by the privilege—mental and emotional only or physical as well as mental and emotional. Thus, under one version of the uniform rule, the privilege extends to any communications made by or to any physician for the purpose of diagnosing or treating any medical condition, not just mental and emotional conditions. Most states that have adopted the uniform rule have chosen this version, that is, have selected the broader class of "physician" and have not restricted the privilege to situations involving diagnosis or treatment of mental or emotional conditions.¹⁰⁸

In contrast to the spousal and physician-patient privileges, proposed Federal Rule of Evidence 503,¹⁰⁹ which deals with the attorney-client

or] psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the [physician or] psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the [physician or] psychotherapist, including members of the patient's family.

108. See J. Weinstein & M. Berger, 2 Weinstein's Evidence ¶ 504[08], at 504-31 (1988).

109. Proposed Federal Rule of Evidence 503 provides:

(a) Definitions.—As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege.—A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(c) Who may claim the privilege.—The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, a similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to

privilege, is similar in many respects to current Louisiana law. The Federal Rule, however, is clearer and more comprehensive in some respects. For example, that rule expressly extends the privilege not only to clients and their lawyers, but also to the representatives of those persons. The rule also clearly provides that the privilege may be claimed either by the client or by the lawyer on behalf of his client. Like current Louisiana law, the proposed federal rule contains several exceptions. These exceptions include the crime-fraud situation, claims based on a breach of duty either by lawyer or client, matters involving persons who are claimants through the same deceased client, situations in which a document has been attested by the attorney, and situations involving representation of joint clients.

the contrary.

(d) Exceptions.—There is no privilege under this rule:

(1) Furtherance of crime or fraud.—If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) Claimants through same deceased client.—As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) Breach of duty by lawyer or client.—As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or

(4) Document attested by lawyer.—As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) Joint clients.—As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.